

March 21, 2005

Hubert T. Bell
Inspector General
U.S. Nuclear Regulatory Commission
Mail Stop T5-D28
11545 Rockville Pike
Rockville, MD 20852-2738

Dear Mr. Bell:

I am writing to request that you conduct an investigation into the manner in which the Nuclear Regulatory Commission (NRC) has been granting access to Safeguards or other types of controlled information, as well as its plans to promulgate regulations to further restrict the dissemination of information that has to this point been publicly available. While I am certainly supportive of efforts to ensure that information that could assist a terrorist in attacking a nuclear facility is properly secured, I am concerned that the Commission may be improperly restricting access to specific documents that should be releasable from a security perspective but are nevertheless being withheld from public release. I am concerned about the possibility that such action may have the effect of preventing the public from obtaining access to information needed to effectively participate in the Commission's regulatory activities, monitor the Commission's work, or critique or challenge the Commission's policies or actions. The following specific circumstances and incidents exemplify my concerns:

- In February 2005, the Commission announced that it was planning to promulgate a rulemaking regarding the use of safeguards information. According to the February 15, 2005 edition of Energy Daily, NRC restrictions on the dissemination of sensitive information will be broadened to include emergency evacuation plans and engineering and safety analyses concerning the protection of nuclear materials. According to the article, officials from the States of Illinois and Washington raised concerns about the breadth of the proposed rule. I am concerned that rather than pursuing prudent security measures, the NRC may be attempting to use its regulatory authority to permanently bar access to information needed by non-industry stakeholders who might have environmental, health, security or safety concerns about Commission or nuclear industry activities. For example, if access to emergency evacuation programs is withheld from state and local officials, how will these officials be able to weigh in on proceedings related to the re-licensing of existing reactors or licensing new reactors? How will such officials be able to faithfully discharge their public health and safety responsibilities? How will the communities living near the reactors know how to proceed with an emergency evacuation?

- I have been informed that at a January 12, 2005 meeting at the NRC, Commission staff indicated that the agency is considering altering its definition of "proprietary information" to include material that is currently releasable to the public so it can be withheld in the future. This material would be shared within the industry, but not with the public. The purpose of a "proprietary information" designation is to protect the economic advantage that trade secret information provides a licensee or a vendor of that licensee, and therefore when the alleged "proprietary information" is shared with all licensees and all vendors of all licensees as NRC reportedly proposes to do, there are clearly no economic interests to protect. I am concerned that such a policy directive may not be legal, and may also result in excessive secrecy.
- To date, the Commission is attempting to prevent the National Academies of Science (NAS) from publicly releasing an *unclassified* version of a Congressionally-mandated study on the safety and security concerns associated with spent nuclear fuel, citing security concerns. I have reviewed both a "safeguards" draft of the NAS report as well as NRC correspondence on the matter, and it appears that the Commission's desire to prevent public access to the NAS report is based on the fact that it disagrees with the NAS' conclusions, not on any legitimate security concerns.
- In the fall of 2004 and winter of 2005, I received correspondence from the Commission that, along with attachments thereto, was marked 'For Official Use Only (FOUO).' In one instance, Commission staff later responded to my staff's request for an explanation that the designation was intended to apply only to a portion of the correspondence that disclosed security sensitive information, and the rest of the documents could therefore be publicly released. In a second instance which has yet to be resolved, much of the FOUO information contained in the materials was designated as such because at the time the source documents were created, they were considered pre-decisional. Despite the expenditure of significant Commission staff attention to this matter and the fact that the decision in question was made months ago, the Commission has still not authorized the public release of most of these documents.
- The Commission barred access to portions of the materials on its website on more than one occasion in order to remove documents that posed a security concern, but has allowed its proceedings to go on even though some non-industry stakeholders were unable to obtain access to documents needed to participate¹. Recently, although the NRC told me that access to some documents needed by those seeking to participate in ongoing Commission proceedings would be granted on a case-by-case basis², my office has learned from an individual who attempted to determine which documents he would be allowed access to that this was not the case. For example, the Commission has

¹ Please see http://www.house.gov/markey/Issues/iss_terrorism_ltr011015.pdf, http://www.house.gov/markey/Issues/iss_terrorism_ltr011115.pdf and http://www.house.gov/markey/Issues/iss_terrorism_ltr011115a.pdf) regarding 2001 correspondence between Rep. Markey and the NRC on this matter.

² Please see http://www.house.gov/markey/Issues/iss_nuclear_ltr041029.pdf and http://www.house.gov/markey/Issues/iss_nuclearreactorsec_2ltr041203.pdf for this 2004 correspondence.

posted Federal Register notices about public comment periods on its website, but the documents cited in these notices were unavailable, as were all other documents one would need to review to intervene in a case. Moreover, the NRC denied my request that all non-essential Commission proceedings be suspended until the public could access relevant documents (though it did state that some extensions to specific proceedings might be warranted).

- In several instances in the past year, the Commission has posted notices for public meetings on Commission proceedings in a manner that essentially precluded public attendance (i.e. the Federal Register Notice appeared the day before, of or after the public meeting occurred).
- On March 11, 2004, I wrote the NRC regarding its decision to bar non-industry stakeholders with security clearances from obtaining access to materials they required to prepare a petition to oppose an licensee application, while granting industry stakeholders unfettered access to such materials³. Similarly, on December 9, 2002 I wrote to the Commission regarding reports of secret meetings that occurred between the Commission and the NEI, the lobbying group for the nuclear industry⁴, to discuss potential upgrades to security at nuclear reactors (while non-industry security experts were essentially barred from participating in the process). I have learned that non-industry experts are almost never granted 'need to know' even when they possess the necessary security clearances. Moreover, in the rare event that they are granted, the process takes an inordinately long time, and these individuals must continually demonstrate a 'need to know' for each document they request access to. In contrast, nuclear industry members are reportedly able to receive the 'need to know' by merely submitting their names and social security numbers to the Commission.
- A May 27 1998 report published by your office stated that "since March 1997, a number of meetings took place between individual NRC Commissioners and senior officials from [Northeast Utilities] at NRC Headquarters. Although not prohibited by law or regulation, the frequency of these non-public meetings coupled with the lack of a public record of the issues discussed and the virtual absence of similar meetings with members of the public are actions which appear to run counter to the [NRC's] promulgated Principles of Good Regulation regarding Independence and Openness. The principles of Independence and Openness require the NRC to transact nuclear regulation publicly and candidly, and to openly seek and consider the public's input during the regulatory process." Unfortunately, a Commission rule implemented in 1999 allows closed meetings of the full Commission, as long as members do not expect to "form reasonably firm positions" at the meeting on matters before the agency, and although the House of Representatives has passed legislation to remedy this problem more than once, the legislation has never been enacted. As a result, the Commission is currently able to hold closed meetings pursuant to this rules change that could influence the direction of subsequent Commission actions.

³ Please see http://www.house.gov/markey/Issues/iss_nuclear_ltr040311.pdf for this correspondence.

⁴ Please see http://www.house.gov/markey/Issues/iss_nuclear_ltr021209.pdf for this correspondence.

I am concerned that the totality of the Commission's actions reflect a systemic effort to withhold important information from Members of Congress and their staffs, non-industry stakeholders, the press and members of the public, rather than a genuine effort to be protective of national security. I am concerned that the result of these actions may be to inhibit effective oversight of the Commission, and impede public participation in the Commission's proceedings. I therefore request that you conduct an investigation into the manner in which the Commission has responded to requests for information from Members of Congress, non-industry stakeholders and members of the public, the process by which it has allowed non-industry stakeholders and members of the public to participate in Commission proceedings since September 11, 2001, and any changes or proposed changes to its policies related to access to information. I further request that you prepare a report on any findings or recommendations made as the result of your investigation.

Thank you very much for your attention to this important matter. If you have any questions or concerns, please have your staff contact Dr. Michal Freedhoff of my staff at 202-225-2836.

Sincerely,

Edward J. Markey